THE HON'BLE SRI JUSTICE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P. No. 5788 of 2006

Date: 29.09.2006

Between:

The Director of Treasuries and Accounts, Andhra Pradesh, Hyderabad and another.

....Petitioner.

and

Sri G. Veeraswamy.

...

Respondent.

THE HON'BLE SRI JUSTICE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P. No. 5788 of 2006

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

This writ petition is filed aggrieved by the order of the A.P. Administrative Tribunal, in O.A. No. 764 of 2003 dated 28.02.2005, whereby the petitioners herein were directed to fix the seniority of the respondent-applicant in the category of Senior Accountant, as originally proposed by the 2nd petitioner in his letter dated 09.05.2002 and as indicated in the Memo dated 29.05.2001, with all consequential benefits as per rules, and also to consider the case of the respondent-applicant for promotion to the next higher post in accordance with Rules and with all consequential benefits admissible under law.

Facts, in brief, are that the respondent-applicant was initially appointed as a Shroff in the year 1972 and was posted at the District Treasury, Warrangal. His services were regularized with effect from 01.02.1972 and, after completion of the minimum period of five years service as Shroff for being considered for promotion to the post of a Junior Accountant, he was promoted as Junior Accountant on 20.04.1981. He was, thereafter, promoted as a Senior Accountant on 20.03.1986. Contending that he was

entitled to be promoted as a Junior Accountant with effect from 01.02.1977 and as a Senior Accountant with effect from 20.04.1981, the respondent-applicant filed O.A. No. 4699 of 1996 which was disposed of, by order dated 09.12.1999, with a direction that his case be examined and appropriate orders be passed in the light of G.O.Ms. No. 470 dated 21.03.1991. The respondent-applicant filed W.P. No. 12066 of 2000 seeking implementation of these orders and, eventually, G.O.Rt. No. 1612 dated 23.10.2000 was issued fixing the respondent-applicant's seniority in the category of Junior Accountant with effect from 01.02.1977 on notional basis and the competent authority was directed to fix his seniority accordingly after issuing notices to the affected parties. Memo dated 16.04.2001 was issued fixing the respondent-applicant's seniority in the cadre of Junior Accountant with effect from 01.02.1977. The 2nd respondent, in his memo dated 29.05.2001, proposed fixation of seniority of the respondent-applicant in the category of Senior Accountant, with effect from 20.04.1981, on notional basis i.e., from the date of his eligibility for promotion as a Senior Accountant, since he had passed the tests in May 1979 and no person senior to him had acquired qualification for being promoted in the vacancy which had arisen.

The respondent-applicant filed O.A. No. 8927 of 2001 seeking a direction that his Seniority be fixed on a notional basis with effect from 20.04.1981. The said O.A. was disposed of with a direction that his seniority, in the category of Senior Accountant, be finalised within a period of four weeks from the date of receipt of the order. Alleging non-compliance, of the order in O.A. No.

8927 of 2001, the respondent-applicant filed Contempt Application No. 277 of 2002. Thereafter proceedings dated 26.07.2002 was issued fixing his seniority as a Senior Accountant with effect from 20.03.1986 without giving him the benefit of notional fitment from 20.04.1981. Subsequent thereto, the first respondent issued proceedings dated 11.11.2002 confirming the seniority of the respondent-applicant with effect from 20.03.1986.

In his proceedings, dated 11.11.2002, the first petitioner herein took note of the fact that the services of the respondent-applicant was regularized in the category of Junior Accountant, with effect from 01.02.1977, and that his probation was declared in the said category with effect from 31.01.1978. The first petitioner held that, consequent on his notional fitment in the category of Junior Accountant, the respondent-applicant had become entitled for provisional seniority in the category of Senior Accountant from the date his juniors were appointed as Senior Accountants as per rules, but the Regional Joint Director in his memo dated 29.05.2001 had issued notices erroneously to persons likely to be effected, taking into account all those who were below the persons senior to the applicant and that the Regional Joint Director had proposed to place the respondent-applicant “below the senior” instead of “above the immediate junior”. Taking into consideration the fact that all persons junior to the petitioner had been regularized in the category of Senior Accountant, with effect from 20.03.1986, the first petitioner directed that the seniority of the respondent-applicant be fixed with effect from 20.03.1986. The petitioner was placed at Serial No. 21(A) instead of Sl.No.39 in the

seniority list of Senior Accountants.

Aggrieved thereby the respondent-applicant filed O.A. No. 764 of 2003. The Tribunal, in its order in O.A.No.764 of 2004 dated 28.02.2005, held that the respondent-applicant was not given promotion as a Junior Accountant from the due date for no fault of his and this mistake was later rectified in G.O.Rt. No. 1612 dated 23.10.2000, that because of the ignorance of the Rule, on the part of the first petitioner, the respondent-applicant had been denied his legitimate claim for consideration for promotion to the post of Senior Accountant, with effect from 20.04.1981, though a vacancy was available and the respondent-applicant was eligible and qualified. The Tribunal held that the contention of the petitioners herein, that the date of regularization of the respondent-applicant, in the category of Senior Accountant, had to be fixed only with reference to the date of regularization of his immediate junior was not acceptable and that the respondent applicant was entitled for notional seniority in the category of Senior Accountant from the date he became eligible and when there was a vacancy of Senior Accountant available which could not be filled up for want of eligible candidates. While holding that the respondent-applicant could not claim seniority, based on a notional date over and above his immediate senior, the Tribunal held that he was certainly entitled to seniority from the date the vacancy in the post of Senior Accountant arose as the respondent-applicant was eligible and qualified to hold the post of Senior Accountant on that date. The Tribunal held that case of the respondent-applicant was not considered earlier as his notional seniority had not been fixed in

the category of Junior Accountant. While setting aside the impugned proceedings dated 11.11.2002 the Tribunal directed the petitioners herein to fix the seniority of the respondent-applicant, in the category of Senior Accountant with effect from 20.4.1981, as originally proposed by the 2nd respondent in its letter dated 09.05.2002, and as indicated in the memo dated 29.05.2001, with all consequential benefits. The petitioners herein were also directed to consider the case of the respondent-applicant for promotion to the next higher post in accordance with Rules and with all consequential benefits admissible under law.

Before us, Learned Government Pleader for Services would submit that the Tribunal had erred in holding that the respondent-applicant was entitled for regularisation in the category of Senior Accountant from the date he became eligible and when there was a vacancy of Senior Accountant available which was not filled up. Learned Government Pleader would submit that mere existence of a vacancy would not confer any right on the eligible candidates to claim that they should be appointed to the said post, for these were all matters for the Government, in its wisdom, to decide as to whether the available post should be filled up or kept vacant. Learned Government Pleader would place reliance on **Union of India Vs. Majji Jangammayya**[1] and **Rani Laxmibai Kshetriya Gramin Bank Vs. Chand Behari Kapoorair**[2].

Sri M.R. Tagore, learned Counsel appearing on behalf of the respondent-applicant, on the other hand, would submit that there was a clear vacancy of Senior Accountant available in the review

panel as on 01.03.1981, on which date the respondent-applicant was fully qualified and eligible, but did not have the minimum length of service in the feeder category of Junior Accountant, since he was earlier treated as having been appointed as Junior Accountant only on 20.04.1981. Since, however, under G.O.Rt. No. 1612 dated 23.10.2000, he was given notional seniority as a Junior Accountant, with effect from 01.02.1977, he was eligible for being promoted as a Senior Accountant in the vacancy which arose on 01.03.1981. Learned Counsel would also refer to the clarifications sought for by the first petitioner, vide proceedings dated 10.06.2002, to which the Regional Joint Director had submitted a detailed report on 21.06.2002 stating that, in the year 1980, there were eight posts in the Junior Accountants category which were upgraded as Senior Accountants vide memo dated 26.03.1981, that out of the eight vacancies only seven were filled up and one post could not be filled up due to non-availability of qualified candidates at that point of time. Learned Counsel would submit that, since notional seniority of the respondent-applicant, as a Junior Accountant, was fixed with effect from 01.02.1977, he was eligible and qualified to be appointed as a Senior Accountant when the vacancy arose in the review panel on 01.03.1981 and as such he ought to have been given the benefit of notional fitment as a Senior Accountant with effect from 20.04.1981.

In **Majji Jangammayya**[1], the Apex Court observed:

"……..**No employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs. The Government has the right to keep the vacancy unfilled as long as it chooses**……"

(emphasis supplied)

Again in **Jatinder Kumar Vs. State of Punjab**[3], the Apex Court held:

"…..This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz. bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. **But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus.** We are supported in our view by the two earlier decisions of this Court in *A.N. D'Silva* v. *Union of India: AIR 1962 SC 1130* and *State of Haryana* v. *Subash Chander Marwaha: AIR 1973 SC 2216……..''(emphasis supplied)*

Again in **Ashwani Kumar Singh Vs. U.P. Public Servoce Commission**[4], the Apex Court observed:-

"…..**It has not laid down as a rule of universal application that whenever vacancy exists persons who are in the merit list perforce have to be appointed. Much would depend upon the statutory provisions governing the field**….."……. (emphasis supplied)

No employee has a right to have a vacancy in the higher post filled as soon as the vacancy occurs. It is always open to the government to keep the vacancy unfilled as long as it chooses. We are not informed of any rule which requires a vacancy to be filled up, immediately after it has arisen, from amongst the available eligible candidates. The mere fact that a vacancy was available, in the category of Senior Accountants, on 01.03.1981, did not confer on the respondent-applicant an indefeasible right to

be appointed to the said post as it was always open to the government to keep the post vacant. It is only if the post had been filled up, by appointing a person junior to him, could the respondent-applicant have had any grievance in this regard. The first petitioner herein has granted notional fitment of seniority, to the respondent-applicant, with effect from 20.03.1986, the date on which persons juniors to the respondent-applicant were regularized in the category of Senior Accountants. The respondent-applicant was also placed above them in the seniority list of Senior Accountants. The Tribunal has, in our view, exceeded its jurisdiction in holding that since a vacancy was available, and the respondent-applicant was eligible and qualified, he was entitled to be promoted as a Senior Accountant from 20.04.1981. The Tribunal failed to notice that mere existence of a vacancy does not confer an indefeasible right of any employee to claim that the said post be filled up immediately or that he forthwith be appointed in the vacancy as soon as it has arisen. The order of the Tribunal, in effect, amounts to issuance of a mandamus to the government to fill up the vacancy from the date it was available. In view of the settled legal position that no employee has any such indefeasible right, the order of the Tribunal, in directing the petitioners herein to fix the seniority of the respondent-applicant with effect from 20.04.1981, is set aside. The consequential direction to consider the case of the respondent-applicant for promotion is also set aside.

The writ petition is allowed. The impugned order of the Tribunal in O.A. No. 764 of 2003 dated 28.02.2005 is set aside.

However, in the circumstances, without costs.

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B.PRAKASH RAO, J

Date: .09.2006

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RAMESH RANGANATHAN, J

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[1] AIR 1977 SC 757

[2] 1998 SC 3104

[3] AIR 1984 SC 1850

[4] AIR 2003 SC 2661